

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

To be argued by:
Joseph A. Pavone
Estimated Time: 15 Minutes

Docket No. 77-1410

In The
United States Court of Appeals
For the Second Circuit

UNITED STATES OF AMERICA,

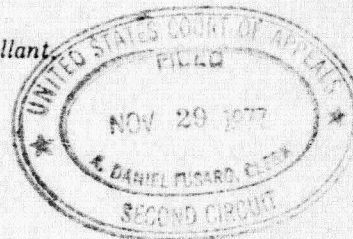
Appellee,

vs.

ANTHONY L. CAVALLARO,

Appellant.

On Appeal from the United States District Court
Northern District of New York



BRIEF FOR APPELLEE,
United States of America

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BRIEF FOR APPELLEE,
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STATEMENT OF THE ISSUES

1. Whether the appeal should be dismissed as an impermissible attempt to review a sentence on the ground that it is excessive.
2. Whether the punishment provision of the Federal Kidnaping Act provides for cruel and unusual punishment in violation of the Eighth Amendment to the Constitution.
3. Whether the District Court abused its discretion in imposing sentence in the first instance or abused its discretion in denying the motion for reduction of sentence.

HISTORY OF THE CASE
AND STATEMENT OF FACTS

On July 13, 1976, after trial by jury, the appellant, Anthony L. Cavallaro, was found guilty of kidnaping and aiding and abetting a kidnaping in violation of Title 18, United States Code, Sections 1201(a) and 2. (A-2)¹.

On September 16, 1976, Judgment was entered against Cavallaro and he was sentenced to the custody of the Attorney General for imprisonment for a period of twenty-five (25) years. (A. 6). On April 19, 1977, that Judgment was affirmed by this Court. United States v. Cavallaro and Brown, 553 F.2d 300 (C.A. 2, 1977). Shortly thereafter, Cavallaro sent a handwritten letter to the trial judge, the Honorable Lloyd F. MacMahon, requesting a reduction of his sentence (A. 10-13). That letter was treated as a motion for reduction of sentence pursuant to Rule 35, Fed. R. Crim. P. and it was denied by an Order endorsed on the letter and filed on June 2, 1977. (A. 13).

Cavallaro appeals from the denial of his motion for reduction of sentence.

1 References are to the Appendix filed with the Brief on behalf of the Appellant Anthony L. Cavallaro.

ARGUMENT

POINT I

THE APPEAL SHOULD BE DISMISSED AS
AN IMPERMISSIBLE ATTEMPT TO REVIEW
A SENTENCE ON THE GROUND THAT IT IS
EXCESSIVE

It is a well accepted principle within the Federal Criminal Justice system that appellate courts have limited power to review sentences imposed by district court judges. Counts v. United States, 527 F.2d 542, 544 (C.A. 2, 1975); United States v. Brown, 479 F.2d 1170, 1172 (C.A. 2, 1973); United States v. Dawson, 400 F.2d 194, 200 (C.A. 2, 1968), cert. denied, 393 U.S. 1023. See also Giblin v. United States, 523 F.2d 42, 45 (C.A. 8, 1975), cert. denied, 424 U.S. 97; United States v. Wilkinson, 513 F.2d 227, 234 (C.A. 7, 1975); United States v. Bowser, 497 F.2d 1017, 1018-1019 (C.A. 4, 1974), cert. denied, 419 U.S. 857; United States v. Kohlberg, 472 F.2d 1189, 1190 (C.A. 9, 1973); United States v. Williams, 446 F.2d 486, 488 (C.A. 5, 1971). "Absent the sentencing judge's reliance on constitutionally impermissible factors or upon material inaccuracies, it is not [the Circuit Court's] function to review a sentence falling within statutory limits." United States v. Brown, supra, at 1172.

In this case, there is no question that the sentence

falls within statutory limits. Moreover, Cavallaro makes no allegation, let alone a showing, that the sentencing judge placed reliance on constitutionally impermissible factors or upon material inaccuracies in imposing sentence.

The United States submits that the essence of Cavallaro's position in this case is that his sentence is, in his opinion, too long. This position puts forth no basis which gives this Court a reason to review the sentence imposed by the District Court nor a reason to review the District Court's Order denying the motion for reduction of sentence.

POINT II

THE PUNISHMENT PROVISION OF THE FEDERAL KIDNAPPING ACT DOES NOT PROVIDE FOR CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AMENDMENT TO THE CONSTITUTION

The Eighth Amendment to the Constitution of the United States proscribes the inflicting of "cruel and unusual punishments." Const. Amend. VIII. When a statute provides for punishment thought to be violative of the amendment, the constitutionality of the statute itself must be attached. United States v. Dawson, supra, at 200.

It is within the purview of the legislative branch of government to prescribe the penalty for crime and prison

sentences falling within the limitations of valid statutes cannot amount to cruel and unusual punishment as contemplated by the Eighth Amendment. United States v. Dawson, supra; Giblin v. United States, supra at 45; Haskins v. United States, 433 F.2d 836, 839 (C.A. 10, 1970); Smith v. United States, 407 F.2d 356, 359, (C.A. 8, 1969), cert. denied, 395 U.S. 966; Martin v. United States, 317 F.2d 753, 755 (C.A. 9, 1963); Smith v. United States, 273 F.2d 462, 467-468 (C.A. 10, 1959), cert. denied, 363 U.S. 846.

The case of Gregg v. Georgia, 428 U.S. 153, (1976) represents a landmark decision in which the Supreme Court has recently reviewed the interpretation of the "cruel and unusual punishment" provision of the Eighth Amendment. In Gregg, the Court held that the penalty of death was not a form of punishment proscribed by the Eighth Amendment. Gregg v. Georgia, supra, at 187. In so holding, the Court reviewed the history and precedential evolution of the "cruel and unusual punishment" clause concluding in part that punishment for crime must not be "excessive". Id. at 173.

* * * [T]he inquiry into "excessiveness" has two aspects: First, the punishment must not involve the unnecessary and wanton infliction of pain. * * * Second, the punishment must not be grossly out of proportion to the severity of the crime * * *. (citations omitted). Id. at 173.

The court made it very clear that such an inquiry must afford great deference to the Legislative process when it stated the following:

Therefore, in assessing a punishment selected by a democratically elected legislature against the constitutional measure, we presume its validity. We may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved. And a heavy burden rests on those who would attack the judgment of the representatives of the people.

This is true in part because the constitutional test is intertwined with an assessment of contemporary standards and the legislative judgment weighs heavily in ascertaining such standards. "[I]n a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people." Id. at 175.

It is against the teachings of Gregg v. Georgia that the punishment provision of the Federal Kidnaping Act must be tested. Title 18, United States Code, Section 1201(a) provides for punishment by imprisonment for any term of years or for life for whoever kidnaps another and transports that person in interstate or foreign commerce regardless of the reason for the abduction. It cannot seriously be argued that incarceration per se constitutes cruel and unusual punishment since it does not involve unnecessary and wanton infliction of pain; moreover, the United States submits that it cannot be seriously argued that a possible sentence of life imprisonment for the crime of kidnaping is not grossly out of proportion to the severity of the crime. Our society maintains the personal freedom of the individual as sacred; it necessarily follows that the unlawful deprivation of that personal freedom through a kidnaping is a serious crime in such a society. Accordingly, when Congress established the Federal Kidnaping Act and the possible punishment for its violation, it was insuring the integrity of personal individual freedom; moreover, it recognized degrees of that offense by permitting imposition of less than the maximum sentence.

The penalty provision of the Federal Kidnaping Act has been the subject of review by the Supreme Court. In United States v. Jackson, 390 U.S. 570 (1967), the United

States appealed the dismissal of an indictment charging the defendant with kidnaping where the victim was harmed when liberated, a crime which at that time carried a possible maximum sentence of death if the jury so recommended. In reversing the District Court, the Supreme Court agreed that the death penalty provision imposed an impermissible burden upon the Constitutional right to a trial by jury. United States v. Jackson, *supra* at 572. However, the Court refused to invalidate all the penalties of the Act and stated as follows: (Id. at 590-591).

* * * The appellees contend that, without its capital punishment clause, the Federal Kidnaping Act would not distinguish "the penalties applicable to those who do and those who do not harm or kill their victims." Stressing the obvious congressional concern for the victim's safety, they conclude that "it is doubtful that Congress would intend for the statute to stand absent such a feature." This argument is wrong as a matter of history, for Congress enacted the statute "absent such a feature." It is wrong as a matter of fact, for the length of imprisonment imposed under the Act can obviously be made to reflect the kidnaper's treatment of his victim. And it is wrong as a matter of logic, for nothing could more completely obliterate the distinction between "the penalties applicable to those who do and those who do not harm or kill their victims" than the total invalidation of all the penalties provided by the Federal Kidnaping Act--the precise result sought by the appellees.

Thus the infirmity of the death penalty clause does not require the total frustration of Congress' basic purpose--that of making interstate kidnaping a federal crime. By holding the death penalty clause of the Federal Kidnaping Act unenforceable, we leave the statute an operative whole, free of any constitutional objection. The appellees may be prosecuted for violating the Act, but they cannot be put to death under its authority. (footnotes omitted).

In support of his contention that the Federal Kidnaping Act provides for cruel and unusual punishment, Cavallaro relies upon Workman v. Commonwealth, 429 S.W.2d 374, 33 A.L.R. 3rd 326 (Ky. 1968). In Workman, the Court held that a sentence of life imprisonment without benefit of parole for a juvenile (14 year old) is cruel and unusual punishment (33 A.L.R. 3rd at 33). In this case, however, Cavallaro is not a juvenile, he did not receive a sentence of life imprisonment and he will, at some time in his incarceration, be eligible for parole.

POINT III

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION
IN IMPOSING SENTENCE IN THE FIRST INSTANCE AND
DID NOT ABUSE ITS DISCRETION IN DENYING THE
MOTION FOR REDUCTION OF SENTENCE

When Appellate Courts have accepted review of sentences or orders denying motions to reduce sentences, the scope of review has been limited to an inquiry of whether the District Court abused its discretion in imposing the sentence. United States v. Slutsky, 514 F.2d 1222, 1226, (C.A. 2, 1975); Lee v. United States, 501 F.2d 494, 501 (C.A. 8, 1974). Some courts have described the review as limited to cases of gross abuse of discretion. Taylor v. United States, 456 F.2d 1101, 1103 (C.A. 5, 1972), cert. denied, 409 U.S. 856; Giblin v. United States, supra; United States v. Stublefield, 408 F.2d 309, 311 (C.A. 6, 1969).

In this case, Cavallaro apparently claims that the trial judge abused his discretion in imposing sentence and then abused his discretion in denying his request for a reduction of sentence because, in Cavallaro's view, his sentence is too long since he didn't commit a kidnaping in the first place and even if he did commit a kidnaping, it wasn't a bad one, and he isn't a very bad person in any event. However, the obvious response to these arguments is threefold:

1. the jury disagreed with him,
2. the judge disagreed with him, at least to the extent that the judge considered a 25-year sentence as appropriate in view of his record and the events surrounding the kidnaping. (A. p. 6-7);
3. the judge did consider the factors raised by Cavallaro since the sentence imposed is substantially below the maximum permitted by the statute. (A. 7).

Attempts to review and overturn sentencings in kidnaping cases are not uncommon. In Giblin v. United States, supra, a sentence of 100 years was affirmed; in United States v. Fountain, 449 F.2d 629, 634 (C.A. 8, 1971), cert. denied, 405 U.S.A. 29, 30 years was affirmed; in United States v. Hodge, 394 F.2d 122 (C.A. 4, 1968) 50 years affirmed; and in Smith v. United States, 407 F.2d, at 359, life in prison.

It is not the intention of the United States to relitigate the activities of the defendant that constituted the crime of kidnaping for which he was convicted. His conviction was reviewed by this court and affirmed. United States v. Cavallaro and Brown, 553 F.2d 300 (C.A. 2, 1977). However, certain contentions made by Cavallaro in his brief require rebuttal:

1. Contrary to Cavallaro's contention ~~that~~ there was an "alleged" kidnaping (Brief, p. 10), the kidnaping was proved beyond a reasonable doubt;

2. Contrary to Cavallaro's claim that the victim was "detained" for three hours (Brief, p. 10), the evidence established that the abduction consumed at least 5 hours;

3. Contrary to Cavallaro's claim that no force was used to get the victim into the vehicle used in the abduction, (Brief, p. 10), there was evidence to establish that she was forced into the vehicle and that she was forced at gunpoint to remain with Cavallaro and his accomplice until they chose to release her;

4. Contrary to Cavallaro's claim that evidence of an assault was improperly admitted in evidence (Brief, pp. 3, 10), the evidence was proper and it was proper for the sentencing judge to consider it as activity bearing on Cavallaro's character;

5. Finally, the United States submits that an abduction

at gunpoint qualifies as a "normal" kidnaping whatever Cavallaro's definition of the crime. (Brief, p. 10).

The judge who imposed sentence presided over the trial; he heard evidence to establish the crime; he was made aware of Cavallaro's character; at sentencing he was made aware of Cavallaro's family background and his prior criminal record; it cannot be said that he abused his discretion in imposing sentence.

CONCLUSION

Based upon the foregoing, the appeal should be dismissed or the Order denying the Motion for Reduction of Sentence affirmed.

Respectfully Submitted,

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Affidavit of Service

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